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90-637

NO. _____

Supreme Court, U.S.

FILED

OCT 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDITH MAE GRACEY,

PETITIONER

VS.

FREDERICK REIGLE, ESQUIRE

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

EDITH MAE GRACEY, PRO SE
512 MIFFLIN BOULEVARD
SHILLINGTON, PA. 19607
(215) 777 8756

1



QUESTIONS PRESENTED

I. Having ruled that there was a substantial error of law, should the Court of Appeals have corrected the error ?

II. Whether this decision by the Third Circuit conflicts with the decision of the District of Columbia Circuit in Jordan v. Medley and the decision of the Ninth Circuit in White v. Cohen, thereby creating contrary decisions among circuits on the matter of substantial errors ?

III. Whether 11 U.S.C. §363(m) violates due process rights of the Fourteenth Amendment to the U.S. Constitution ?

IV. Whether the Ninth Amendment to the U.S. Constitution allows the petitioner the right to pay the debt by leasing property ?

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OCTOBER TERM, 1990

EDITH MAE GRACEY,

PETITIONER

VS.

FREDERICK REIGLE, ESQUIRE

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

Edith Mae Gracey petitions for writ of
certiorari to review the decision of the
United States Court of Appeals for the Third
Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is
Appendix "E". The decision of the District
Court is Appendix "D".

JURISDICTION

The judgment of the Court of Appeals (Appendix "E") was entered on August 10, 1990.

The petition for rehearing was denied on September 14, 1990. The motion to stay the mandate pending application for writ of certiorari was granted until October 21, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254, Supreme Court Rule 17.1(a)(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

11 U.S.C. § 363 (b)(1)

"The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."

11 U.S.C. § 363 (m)

"The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

U.S.C.S. Constitution, Amendment Nine:

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S.C.S.Constitution,Amendment Fourteen:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PURSUANT TO SUPREME COURT RULE 28.4 (b)

" 28 U.S.C. § 2403 (a) may be applicable and shall be served upon the Solicitor General."

STATEMENT OF THE CASE

The Third Circuit Court of Appeals ruled that the decisions of the Lower Courts to sell the real estate property of Edith Mae Gracey were based on an error of law. However, the Third Circuit did not reverse the sale. The sale was affirmed by Order of August 10, 1990.

Edith Mae Gracey, "Gracey", had requested that the U.S. Bankruptcy Court allow her to lease the commercial real estate as an alternative to the sale of her livelihood property. The sale of the property would create huge capital gains taxes. Two of the four creditors and Gracey, objected to the sale motion of Trustee Frederick Reigle, Esquire. Gracey had proposed a triple net lease, from a major corporation, that would generate more money than the sale. The Bankruptcy Court and Trustee Reigle insisted that the Bankruptcy Code does not permit leasing in Chapter 7 cases. The Gracey case is in Chapter 7. The Order to sell the property was issued November 22, 1989.

Gracey appealed the Order for the sale on November 27,1989, pursuant to 28 USC § 158(a), and Bankruptcy Rule 8001(a). The U.S.District Court, Honorable Charles R.Weiner granted the motion of Gracey for a stay pending appeal on November 29,1989. During a short hearing on the stay (on December 8,1989) Judge Weiner requested that Trustee Reigle consider the lease. However, Frederick Reigle,Esquire (and his attorney Dale Lapp) and creditor Day counsel Tunnell, all misinformed the Court that leasing was not permitted in Chapter 7 cases by the Bankruptcy Code. Based on the misinformation that the Bankruptcy Code did not permit leasing (as requested by Gracey and two of the creditors) the Court lifted the stay on December 12,1989. The property was hastily sold on December 13,1989. Gracey then appealed the lifting of the stay.

For unknown reasons the appeal of the sale order was not docketed until March 5,1990,with a brief scheduled for March 20,1990.(Appendix "C "). Prior to the filing of scheduled briefs

and departing from the accepted and usual course of judicial proceedings, Judge Weiner did not permit the briefs that were scheduled to be filed by Gracey, and he dismissed the appeal of the sale order on March 13, 1990.

Gracey then appealed to the Third Circuit Court of Appeals. The appeal of the lifting of the stay, and the appeal of the sale order were consolidated.

The Third Circuit ruled that the Lower Courts erred...that the Bankruptcy Code does permit leasing of property under Chapter 7. (Appendix "E8"). The Third Circuit used the exact same section of the Code which creditor John W. Gracey presented beforehand to the Bankruptcy Court in his written objection to the sale and request for approval of the lease. However, the Third Circuit decision condoned the error of law in the Lower Courts by affirming the sale "in the best interest of creditors". (Appendix "E11"). Also, the Third Circuit decision ruled the appeal of the lifting of the stay was moot. The decision was filed on

August 10,1990. (Appendix " E "). A decision on the appeal of the lifting of the stay is a critical issue since the sale can only be voided if there was a stay pending appeal, which there was. The stay was dissolved based on the substantial error of law. The Third Circuit decision deleted that critical portion of the statute [11 U.S.C. §363(m)] in ruling the stay appeal moot.(Appendix " E11"). The decision was filed August 10,1990.(Appendix " E ").

Petition for rehearing was filed since the Appeals Court had overlooked that the lease was a triple net valid lease from a major corporation and would generate an additional \$100,000 in salary for Gracey, for a total of \$200,000. Rehearing was denied September 14, 1990. (Appendix "F").

The motion to stay the mandate was granted until October 21,1990. (Appendix "A").

(Gracey is proceeding pro se.She had been represented by a former district attorney, He has been convicted of manufacturing illegal drugs and is now in prison for 12 years).

REASONS FOR GRANTING THE PETITION

(ARGUMENT)

I.

THE COURT OF APPEALS HAVING RULED THERE WAS A SUBSTANTIAL ERROR OF LAW, FAILED TO CORRECT THE ERROR AND RECOGNIZE THAT THE SUBSTANTIAL ERROR OF LAW TAINTED THE CASE AND ADVERSELY AFFECTED THE RIGHTS OF THE DEBTOR AND TWO CREDITORS.

The linchpin of the case is the consistent refusal of the Lower Courts to allow Gracey to lease the property, stating that leasing was prohibited by the Bankruptcy Code in Chapter 7 cases. The Third Circuit decision has now ruled that the Lower Courts based those decisions on an error of law. The Third Circuit has ruled that under 11 U.S.C. § 363 (b)(1) leasing is permitted in Chapter 7 cases.

The decision of the Third Circuit (Appendix " E8 ") states "Therefore, we conclude that 11 U.S.C. 363(b)(1) allows leasing in some Chapter 7 situations, and that the district court erred by concluding that leasing was not permitted in cases proceeding under that Chapter."

Objections to the sale were filed by two of the four creditors, Virginia Larrabee and John W. Gracey. Creditor John W. Gracey specifically, in a written objection, requested the Bankruptcy Court lease the property pursuant to 11 U.S.C. § 363(b)(1). Therefore, the Lower Courts were made aware in advance of the exact part of the Bankruptcy Code which allows leasing and has now been verified by the decision of the Third Circuit. However, the Third Circuit affirmed the sale of the property stating (in Appendix "E 11") "allowing Gracey to lease the property would not have been in the best interests of the creditors."

The sale of the property which resulted from a substantial error of law has adversely affected the rights of Edith Gracey and creditors Virginia Larrabee and John W. Gracey. The Third Circuit should correct the error. The orders of the Lower Courts to sell the property and lift the stay were based on a substantial error of law. That major initial legal error then prejudiced the whole case. The Third Circuit should correct the Courts' damage.

The record in the Lower Courts proves that the case was a close one. For example; the assets are far greater than the debts; the Bankruptcy Court initially denied the sale; and the U.S. District Court granted a stay. Honorable Charles R. Weiner in the District Court granted a stay based on facts in the case. At the hearing Judge Weiner requested that the trustee consider the lease. (Testimony located in the Third Circuit brief of appellant on Appendix page 18). The trustee once again misinformed the Court that the Bankruptcy Code prohibited a lease. That substantial error of law prejudiced the Court against leasing the property. Whereupon the Court lifted the stay and sold the property. The lifting of the stay was therefore based on an error of law and requires review by the Third Circuit, since the Third Circuit did not review the stay appeal but ruled it was moot. (Appendix "E12").

As Honorable Justice Kennedy of this Court ruled from the Ninth Circuit in White v. Cohen, 635 F2d 761, 763 (CA 9th, 1981), "Since the case was a close one, the prejudicial remarks might

well have been the critical factor in swaying the jurors to side with the plaintiff." Since the case was tainted it was reversed. The Gracey case has been tainted and should be corrected. District Judge Weiner did sway to the Gracey side to lease rather than sell, as the transcript proves. The prejudicial misinformation of Reigle, Lapp and Tunnell destroyed the case.

As Honorable Justice Scalia of this Court ruled in the District of Columbia Circuit in Jordan v. Medley, 711 F2d 211,219(CA D.C.1983) he reversed due to a substantial error of law. " If one cannot say, with fair assurance..... that the judgment was not substantially swayed by the error it is impossible to conclude that substantial rights were not affected....the one-sided or closely balanced nature of the evidence bearing upon the issue which the error arguably affected.....and the centrality of that issue to the ultimate decision....." The central issue was to allow Gracey to raise as much money with a lease as with a sale,

since a sale would unjustly create huge capital gains taxes. The linchpin was 11 USC § 363 (b)(1), which was erroneously disregarded by the Lower Courts. Circumstances in the proceedings relating to the sale were affected by the error of law.

The trustee originally filed a motion for sale to James Boscov on September 5, 1989 for \$115,000. Edith Gracey , creditor Virginia Larrabee and creditor John W. Gracey filed objections to the sale. At the hearing there was testimony by the realtor regarding the existence of a higher bidder for \$120,000. The realtor was unable to explain what happened to the higher bidder. The Court sustained the objections and denied the sale to James Boscov on September 26, 1989 and ordered the Trustee to return his deposit. One month later Trustee Reigle filed another motion for sale at \$120,000 to a "Boscov-Guildin Partnership". Objections were filed by Gracey and the same two creditors. Creditor John W. Gracey requested the property be leased pursuant to 11 USC §363(b)(1). Instead the Court ruled the Code did not permit leasing.

II.

THE DECISION OF THE THIRD CIRCUIT DIRECTLY CONFLICTS WITH THAT OF ANOTHER CIRCUIT

In White v. Cohen, 635 F2d 761,763 (C.A. 9th,1981) Justice Kennedy in the Court of Appeals ruled that an error had so tainted the case as to reverse for a new trial. The conclusion of the Appeals Court was "Since the case was a close one, the prejudicial remarks might well have been the critical factor in swaying the jurors to side with the plaintiff."

The Ninth Circuit corrected the error.

In Jordan v. Medley, 711 F2d 211,219 (C.A. D.C. 1983) Justice Scalia in the Court of Appeals ruled that an error required the case to be reversed for a new trial. Concluding that "...testimony went directly to the central issue of the case...and where the evidence on that issue was closely balanced...we do not have the necessary assurance that the jury's judgment was not substantially swayed."

The D.C. Circuit corrected the error.

As the Supreme Court has described the effect upon "substantial rights" test: "If one cannot say, with fair assurance,...that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

Although the White case and the Jordan case are criminal cases, the same test is used in civil cases. Substantial rights were affected in the Gracey case when the judgment to sell the property was based on a substantial error.

Gracey contends that the opinions of the District of Columbia Court of Appeals and the Ninth Circuit Court of Appeals in reversing for a new trial due to substantial error, contradicts the decision of the Third Circuit in the Gracey case by not correcting the error.

In the present case, the Third Circuit is saying that even if the Lower Courts clearly misread an unambiguous part of its statute, the Courts' hands are tied from correcting this error. This cannot be the status of the law. Gracey has been denied due process under the law and deprived of her property due to error.

III.

11 U.S.C. § 363 (m) VIOLATES THE FOURTEENTH AMENDMENT DUE PROCESS BECAUSE OF ERROR OF LAW

The Third Circuit should not be restricted by 11 U.S.C. §363(m) because the issue of due process should prevail. Gracey was granted a stay as required by 363 (m). The Court of Appeals has ruled that the substantial error of law occurred while the stay issued by the District Court was still in effect. The error of law preceeded the lifting of the stay. The U.S.Constitution, Amendment fourteen: "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

The Third Circuit Opinion in quoting this statute erroneously omits the key wording of the statute "...unless such authorization and such sale or lease were stayed pending appeal." (Appendix "E11"). A stay was granted. However, when the stay was lifted (based on the error of law) the Trustee was required to wait for the

10-day appeal period to expire before selling the property. In Re Winstead, 33 B.R. 408 (DC 1983) In the Gracey case the stay was lifted December 12, 1989 and the property sold December 13, 1989. Gracey appealed the lifting of the stay on December 15, 1989 within the 10-day appeal time.

Therefore, the Court of Appeals should not have ruled the appeal of the lifting of the stay was moot. Having ruled there was an error of law, the Third Circuit should review the lifting of the stay for abuse of discretion and error of law. Otherwise, due process has been violated. The risk is that without any review of a Higher Court, based on §363(m), the Bankruptcy Court can ram through the sale of anything at all with absolutely no restrictions. If a sale takes place without notice, or in violation of any other statute, § 363(m) is a license to steal, in the wrong hands, because in reality it ends any appeal process. Section 363 (m) violates the Fourteenth Amendment. In the Gracey case the error of law preceeded the lifting of the crucial stay but has ended due process, thereby violating the 14th Amendment.

IV.

THE NINTH AMENDMENT GUARANTEES THE RIGHT TO PAY A DEBT WITHOUT THE SALE OF PROPERTY

The U.S. Constitution was based on the Magna Carta. Section nine of the Magna Carta states: "Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt. A debtor's sureties shall not be distrained upon so long as the debtor himself can discharge his debt." The Ninth Amendment to the U.S. Constitution states: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Gracey contends that she is permitted to pay her debt with the proceeds from the leasing of her real estate property. Leasing does not violate any provision within the U.S. Bankruptcy Code. Therefore her property should not be sold. She should be allowed to pay debts.

The decision of the Third Circuit Court of Appeals considered a lease of the property. The lease was from a major corporation after many corporate officers had inspected the site for use as a day care center. (Gracey had constructed the building specifically for that purpose and operated a licensed, tax paying, profitable nursery school there for 15 years.)

The lease was a triple net lease which would net approximately \$100,000 over a five year period (the Third Circuit computed the figure at \$97,320 at Appendix "E10"). However, the Third Circuit overlooked the personal contract for Gracey to manage their day care center, which would increase the value of the lease by another \$100,000. Thereby generating \$200,000 in income for the creditors and Gracey. Keep in mind that two of the four creditors approved.

The result would be no capital gains taxes. Meridian Bank objected to leasing although the debt to Meridian on the building was \$16,000. Counsel for Meridian, Kurt Althouse, was simultaneously acting as defense counsel for Trustee Frederick Reigle on another case.

The property is like a hen that can lay eggs to pay the creditors and feed the debtor. It makes no sense to sell the hen for less money than the eggs can generate. In the Gracey case the issue of capital gains cannot be ignored. The sale of the property leaves Gracey with no livelihood and huge calital gains taxes to pay.

Gracey contends that her Ninth Amendment rights have been violated; that she presented the Courts with a viable, sound plan for full repayment of all debt in excess of the amount realized from the sale of the property; that for reasons known only to others she has been denied the right to pay the debt through the earnings rather than sale based on error of law.

CONCLUSION

Edith Mae Gracey prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted

Edith Mae Gracey

Edith Mae Gracey, pro se

APPENDIX " A "

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos.89-2061 & 90-1207

IN RE: EDITH M.GRACEY,
Debtor, Appellant

Pursuant to Rule 41(b) of the Federal
Rules of Appellate Procedure, it is ORDERED
that issuance of the certified judgment in lieu
of formal mandate in the above cause be, and
it is hereby stayed until October 21, 1990.

s/ Edward R. Becker

Circuit Judge

Dated: OCT 5 1990

APPENDIX " B "

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE : FILED
DEC 12 1989
EDITH M.GRACEY, : BKY.NO.84-00778T
DEBTOR, APPELLANT : MISC.NO.89-0698

MEMORANDUM/ORDER

WEINER, J.

DECEMBER 12, 1989

On November 29, 1989, the debtor filed a prose "Emergency Motion for Stay Pending Appeal" in this continuing bankruptcy saga. The debtor sought to stay the Order of the Bankruptcy Court dated November 22, 1989 to sell real estate located at 525 Philadelphia Avenue, Cumru Township, Berks County, Pennsylvania free and clear of liens and encumbrances and to distribute proceeds. Out of an abundance of caution, this court, by Order dated November 29, 1989, granted the emergency motion and stayed the Bankruptcy Court's order pending a hearing before this court. On December 8, 1989, the court held said hearing. After hearing argument from the debtor and the Trustee, Frederick L. Reigle, it is the ruling of this court that the stay

(B-2)

must be dissolved.

Pursuant to the Bankruptcy Court's Order, the property in question was to be sold to a James S. Boscov for the sum of \$120,000.00. Debtor argued at the hearing that she should be allowed to raise the \$120,000.00 by leasing the property over a three to four year period rather than by selling the property. Debtor overlooks the fact that this matter is currently governed by Chapter 7 of the Bankruptcy Code which involves liquidation. Chapter 7 does not contemplate the leasing of property. Even if the leasing of the property was a viable option under Chapter 7, we would still not allow the property to be leased. Debtor's belief that a three to four year lease could raise \$120,000 is merely speculative, especially when one considers the taxes and expenses that are involved.

In short, the property in question has been vacant for over five years and it is time for the creditors to receive their monies. It appears from the record that debtor had a full arms length hearing before the bankruptcy judge

(B-3)

and that the \$120,000.00 figure is supported by the appraisal estimates. Accordingly, the stay entered by this court on November 29, 1989 is DISSOLVED.

IT IS SO ORDERED.

s/ CHARLES R. WEINER

CHARLES R. WEINER

APPENDIX " C "

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CORRECTED BRIEFING SCHEDULE

IN THE MATTER OF: FILED MAR- 7 1990

IN RE: Edith Gracey :Civil Action No.901535

The record on appeal from the Bankruptcy Court in the above-captioned case was entered on the docket in this office on March 5, 1990 and has been assigned to the Honorable Charles R. Weiner

The following is the schedule for filing briefs with this office:

(1) The Appellant shall serve and file his brief within 15 days after entry of the appeal on the docket.

(2) The Appellee shall serve and file his brief within 15 days after service of the brief on the Appellant.

(3) The Appellant may serve and file a reply brief within five days after service of the brief of Appellee.

Very truly yours,
Michael E. Kunz
s/BY. Janet Fanelli
Deputy Clerk

Copy to: E. Gracey
D. Lapp, Esq.
J. Simmons, Deputy in Charge Bkcy.

APPENDIX " D "

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE

FILED

MAR 13 1990

EDITH GRACEY,

MICHAEL E. KUNZ, CLERK

DEBTOR

: C.A.NO.90-1535

ORDER

WEINER, J.

MARCH 13, 1990

For the precise reasons stated in our Memorandum Opinion and Order of December 12, 1989 in which we, after a hearing, dissolved our previous Order staying the Order of the Bankruptcy Court dated November 22, 1989 which authorized the sale of real estate, the debtor's appeal from the Order of the bankruptcy judge entered on November 22, 1989 authorizing the sale of real estate is DISMISSED.

IT IS SO ORDERED.

3/13/90

cc: E.M. Gracey

s/ Charles R. Weiner

D. Lapp

Charles R. Weiner

F. L. Reigle

J. Simmons

Judges: Fox

ENTERED 3/13/90

Scholl

Twardowski

CLERK OF COURT

APPENDIX " E "

NOT-FOR-PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-2061 and 90-1207

IN RE: GRACEY, EDITH M.

Debtor, Appellant

Appeal From the United States District Court

For the Eastern District of Pennsylvania

(D.C.Misc.No.89-0689)(D.C.90-1535)

District Judge: Honorable Charles R.Weiner

Submitted under Third Circuit Rule 12(6)

May 30, 1990

Before: Becker, Greenberg, and Van Dusen Cir Jud

(Filed AUG 10 1990)

MEMORANDUM OPINION OF THE COURT

BECKER, Circuit Judge.

Debtor-appellant, Edith M. Gracey, pro se,
appeals from an order of the United States

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District Court for the Eastern District of Pennsylvania dismissing her appeal from an order of the United States Bankruptcy Court for the Eastern District of Pennsylvania which approved the sale of a piece of real property owned by Gracey. Gracey also appeals an order of the district court lifting a temporary stay it had granted pending its review of the bankruptcy court's decision. The appeals have been consolidated. For the reasons that follow, we will affirm the orders of the district court.

I.

On March 8, 1984, Gracey sought relief from her creditors by filing a petition in bankruptcy under Chapter 7 of the Bankruptcy Code,¹ 11 U.S.C. §§ 701 et. seq. On June 21, 1984, the court ordered the proceeding converted to one under Chapter 13. Gracey

1. Gracey has four creditors: her mother, Virginia Larrabee; her son, John W. Gracey; American Bank and Trust Company (Meridian Bank); and Mrs. Barbara M. Day.

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submitted a plan which the bankruptcy court refused to confirm. The case was then reconverted on May 22, 1986 (with Gracey's permission) back to Chapter 7. Since June 1986 Gracey has repeatedly attempted, unsuccessfully, to have her case removed from Chapter 7.

The real estate which is the subject of the present appeals is a commercial property located at 525 Philadelphia Avenue, Cumru Township, Pennsylvania. The property is owned by both Gracey and her husband, J. Raymond Gracey, and was previously operated by Gracey as a nursery school.² In September 1987, the bankruptcy court ordered Gracey to notify her students that the school would not reopen in September 1987.

On October 23, 1989, the court-appointed trustee, Frederick Reigle, Esq., moved in the bankruptcy court for the sale of the property to one James S. Boscov for the sum of \$120,000. Although the property had previously been

2. It appears that the Graceys are currently engaged in ongoing divorce proceedings.

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appraised at \$130,000, an appraiser testified before the bankruptcy court that the offer was "good" considering the number of years the property had sat vacant. Objections to the sale were filed by Gracey creditors John W. Gracey and Virginia Larrabee. Gracey herself also objected to selling the property, arguing that she should be allowed to enter into a long-term lease rather than forced to sell the property. In this regard, she submitted written evidence that Genesis Health Ventures had made an offer, on September 10, 1989, to lease the property for five years at a yearly rate of approximately \$16,800.³

3. The offer was for a lease at the rate of \$10.00 per square foot (total square feet approximately 1,680) for the first year, with an escalator for the second through fifth year based on the Consumer Price Index but not to exceed \$2.00 per square foot. The agreement was contingent on a number of factors and issues which had yet to be resolved, including Genesis taking a survey of its employees to see how many were interested in participating in a day care program, and on Gracey agreeing to manage a day care center to be operated at the property. It also would have required Gracey to be responsible for insurance coverage and property maintenance.

(E-5)

Gracey contended that the lease would be at least as profitable as the sale of the property.⁴ Nonetheless, on November 22, 1989 the bankruptcy court granted the motion to sell the property.

Gracey then filed both an appeal to the district court and an emergency motion for a stay pending appeal. On November 29, 1989, the district court granted Gracey's emergency motion for stay pending appeal. On December 12, 1989, after a hearing, the district court dissolved the stay, concluding: (1) that Chapter 7 of the Bankruptcy Code contemplates liquidation of a debtor's assets, not long-term leasing of them, and since Gracey was proceeding under Chapter 7, she should not be allowed to lease her property; and (2) alternatively, it could not approve the leasing arrangement proposed by Gracey because Gracey's estimate of the amount of money that could be raised

4. Gracey argued that this was so because, even though the five-year value of the lease (with the maximum escalator) was only \$97,320, capital gains taxes would become due if the property was sold for the \$120,000.

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was highly speculative, and thus allowing her to enter the leasing agreement would not be in the best interests of the creditors.⁵

The sale proceeded on December 13, 1989. On December 15, 1989, Gracey filed an appeal of the order lifting the stay and an emergency motion requesting a stay pending appeal with this court. The emergency motion for a stay was denied. On March 13, 1990, the district court dismissed Gracey's appeal from the order of the bankruptcy court citing its earlier opinion dissolving the stay it had granted her. On March 16, 1990, Gracey filed an appeal of the district court order which dismissed her appeal of the bankruptcy court order authorizing sale of the property. As noted, Gracey's appeal of the order lifting the stay and her appeal of the order of the district court dismissing her appeal have been consolidated.

5. The district court's wording was:

"Chapter 7 does not contemplate the leasing of property...and [e]ven if the leasing of the property was a viable option under Chapter 7, we would still not allow the property to be leased...[because] debtor's belief that a three to four year lease could raise \$120,000 is merely speculative..."

App. at 67.

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On appeal, Gracey argues that she should have been permitted to lease the property in question instead of being forced to sell it. The trustee argues that the district court did not err by affirming the bankruptcy court's order allowing the sale of the property, and that, in any event, because the property has already been sold, the issue is moot.

II.

A.

We first review the district court's conclusion that, because this case was proceeding under Chapter 7, it could not allow leasing of Gracey's property. Because the district court's conclusion that this was so is one of law, our review is plenary. Dent v. Cunningham, 786 F.2d 173,175 (3d Cir.1986).

The purpose of Chapter 7 of the Bankruptcy Code, as reflected by the fact that the title of the chapter is "liquidation" is liquidation of the estate. However, it does not appear that leasing of property is forbidden in all cases proceeding under Chapter 7. Indeed, the Bankruptcy Code specifically provides that

leasing is permitted in some situations.

Chapter 3 of the Bankruptcy Code, 11 U.S.C.

§ 363(b)(1), provides that the "trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."⁶ Chapter 1 of the Bankruptcy Code, 11 U.S.C. § 103, provides, with an exception not relevant here, that Chapter 3 is applicable to bankruptcy proceedings under all chapters, including Chapter 7. See also In re Engstrom, 33 B.R. 369 (D. S.D. 1983) (section 363 applicable in Chapter 7 cases, and a trustee may lease property when it is in the best interest of the estate).

Therefore, we conclude that 11 U.S.C. § 363(b)(1) allows leasing in some Chapter 7 situations, and that the district court erred by concluding that leasing was not permitted in cases proceeding under that chapter.

6. If, pursuant to 11 U.S.C. § 721, the court finds it to be in the best interests of the estate, the trustee may also lease property in the ordinary course of business. 11 U.S.C. § 363(c)(1). Since Gracey's proposed lease would have been outside of the ordinary course of business, we need not be concerned with this issue.

We next review the district court's alternative conclusion that it still would not have allowed Gracey to lease the property to Genesis Health Ventures because, even if leasing were feasible in Chapter 7 cases, Gracey's belief that the lease would raise \$120,000 in three to four years was speculative and hence allowing her to enter into the lease would not be in the best interest of the creditors. Overall, we review the district court's decision not to allow Gracey to enter into a lease for abuse of discretion, see generally In re Sharon Steel Co., 871 F.2d 1217, 1225 (3d Cir.1989), although we review the district court's specific factual determinations for clear error. Cooper v. Tard, 855 F.2d 125, 126 (3d Cir.1988).

We look to Genesis' offer to lease to determine if Gracey's contention that the lease would raise \$120,000 in three to four years is realistic. The lease would raise approximately \$16,680 in the first year. However, even with

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the maximum rent increase of two dollars per square foot (allowed by the lease after the first year), the lease would yield only \$20,160 in each subsequent year. At best, the lease would raise a total of \$97,320 over its five-year term. This does not include taxes and additional expenses that the agreement with Genesis imposes upon the owner, such as property maintenance and insurance. Moreover, as noted, supra, footnote 3, Genesis' offer to lease was not a firm offer, but was contingent upon a number of factors yet to be resolved. Accordingly, we cannot describe as clearly erroneous the district court's conclusions (1) that Gracey's estimate of lease revenue was speculation, and (2) that allowing Gracey to enter into the lease, instead of selling the property, would not be in the best interests of the creditors. Neither can we say that the court's decision declining to allow her to do so was an abuse of discretion. We will, therefore, affirm the district court's order dismissing the appeal on the basis of its alternative conclusion that allowing Gracey to lease the

(E-11)
property would not have been in the best
interests of the creditors.

C.

Appellee also contends that even if the
court erred by not allowing Gracey to lease
the property to Genesis, the issue is moot,
pursuant to 11 U.S.C. § 363(m), because the
property has now been sold to a good faith
purchaser.⁷ Because we have held that the
district court did not err by refusing to allow
Gracey to lease,⁸ we need not address this issue.

7. 11 U.S.C. 363(m) provides:

The reversal or modification on appeal
of an authorization...of a sale or
lease of property does not affect the
validity of a sale or lease under such
authorization to an entity that
purchased or leased such property in
good faith, whether or not such entity
knew of the pendency of the appeal...

8. Since we are affirming the order of the
district court dismissing Gracey's appeal, her
appeal from the district court's order lifting
the stay is moot. Accordingly, we will also
dismiss it as such.

For all of the foregoing reasons, the order of the district court dismissing the appeal of the bankruptcy court order will be affirmed. The appeal from the order of the district court lifting the stay on the sale of Gracey's property will be dismissed as moot.

TO THE CLERK:

Please file the foregoing opinion.

s/ Edward R. Becker

Circuit Judge

APPENDIX "F "

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-2061 and 90-1207

IN RE: GRACEY, EDITH M.

Debtor, Appellant

(D.C.Misc. Nos.89-0689 & 90-1535)

SUR PETITION FOR PANEL REHEARING

Present: BECKER and GREENBERG, Circuit Judges,
and VAN DUSEN, Senior Circuit Judge

The petition for rehearing filed by
appellant having been submitted to the judges
who participated in the decision of this court
and no judge who concurred in the decision
having asked for rehearing, the petition for
panel rehearing is DENIED.

BY THE COURT:

s/Edward R. Becker

DATED: SEP 14 1990

Circuit Judge

RECEIVED AND FILED 9-14-90